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No. 84-0315

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LEONARD G. LEVERSON,

Appellant,

v.

WILLIAM H. CONWAY, COMMISSIONER,
VERMONT DEPARTMENT OF
MOTOR VEHICLES,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF VERMONT

MOTION TO DISMISS OR AFFIRM

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I. MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Vermont Supreme Court for the following reasons:

1. The case lacks a substantial federal question.

2. The case is not within the appeal jurisdiction of this Court.

II. STATEMENT

Appellant, a new resident of Vermont, has challenged the state's failure to afford him credit toward its automobile use tax, Vt. Stat. Ann. tit. 32, § 8903(b), for the sales tax paid to Wisconsin, his prior state of residence. Under the mistaken assumption that he would have received credit for the sales tax paid Wisconsin "had [he] been a resident of Vermont at the time he purchased his car," Jurisdictional Statement at 5, appellant claims that the denial of credit infringes his right to travel and violates the Commerce Clause, Article I, § 8, cl. 3, the Privileges and Immunities Clause, Article IV, § 2, cl. 1, and Equal Protection Clause, Amendment XIV, § 1, cl. 4. Central to these claims is appellant's misinterpretation of how the tax is calculated and applied, and his unsubstantiated belief that he has been the victim of discrimination by Vermont. Because the tax scheme does not discriminate against new residents, on its face or as applied, and because the decision of the Vermont Supreme Court is clearly correct, a substantial federal question is not presented.

III. ARGUMENT

A. The Vermont Tax Scheme Clearly Does Not Discriminate Against New Residents Who Become Liable For The Motor Vehicle Use Tax, And Thus A Substantial Federal Question Is Not Presented.

An individual who moves to Vermont, who becomes a "resident", Vt. Stat. Ann. tit. 32, § 8902(2), and who desires to use his or her car in this state is required to pay the use tax and to register it here. See Vt. Stat. Ann. tit. 32, §§ 4(30), 302. Until that person becomes a resident, however, he or she has the unlimited right to drive the car on its highways. The liability for the use tax arises only when the person becomes a resident, and the taxable basis is the car's low "book value" at that time; the tax is not calculated on the basis of the car's value when originally purchased. Vt. Stat. Ann. tit. 32 § 8907. Regardless of the person's state of origin, the tax rate is the same: four percent of the taxable cost or $600, whichever is smaller. Vt. Stat. Ann. tit. 32 § 8903(b).

The resident who purchases a car in Vermont is liable for the full sales tax (i.e., the lesser of four percent of the vehicle's taxable cost, or $600). Vt. Stat. Ann. tit. 32 § 8903(a). If the resident were to purchase a car in a state that does not afford reciprocity with Vermont, he or she would be liable, upon registering the vehicle in Vermont, for the full use tax. Vt. Stat. Ann. tit. 32, §§ 8903(b), 8911(9). If the resident were to purchase a car in a state that affords reciprocity, he or she would receive a credit toward the Vermont use tax of the sales tax paid the other state, but would also be liable for any difference between the two. Vt. Stat. Ann. tit. 32 § 8911(9).

When appellant purchased his car in Wisconsin he was a resident of that state and was obligated to pay its sales tax. As a resident of Wisconsin he had the right to use all its highway facilities. The sales tax bore a reasonable relationship to the services provided by Wisconsin and the revenue so raised accrued solely to its coffers. *J.C. Penny & Co., Inc. v. Hardesty*, 264 S.E. 2d 604 (W. Va. 1980). As a Wisconsin resident appellant was also obligated to permanently register the car in that state if he desired to use it there. Wis. Stat. Ann. § 341.40(2)

Appellant subsequently chose to move to Vermont, to become a resident, and to continue to drive his car on this state's highways. When he became a resident and obligated to register the car, Vt. Stat. Ann. tit. 32, § 8902(2), the use tax of $112 was imposed. By imposing the tax on the basis of its low book value as of the date of registration, appellant was treated by the state as though he had just purchased it in Vermont. If, at that time, a longstanding resident had purchased the identical car in Vermont a sales tax of $112 would likewise have been imposed. Vt. Stat. Ann. tit. 32, § 8903(a). If, at that time, a longstanding resident had purchased the identical car in a reciprocal state the $112 would be divided between it and Vermont; the reciprocal state would keep a portion (its sales tax, if any), but the resident would be liable to Vermont for the difference between it and the use tax, Vt. Stat. Ann. tit. 32, § 8911(9), if he or she desired to drive it in Vermont. Vt. Stat. Ann. tit. 32, §§ 8902(2), 8903(b). Appellant ignores the fact that if the Vermonter had permanently registered the car in the state where it was purchased,

he or she would not receive credit toward the use tax if registration were subsequently sought in Vermont: a resident must register the car and pay the sales or use tax in Vermont in order to drive it on public highways. Vt. Stat. Ann. tit. 23, § 301. If it were permanently registered elsewhere, the owner would not be considered a Vermont resident for the purpose of the § 8911(9) credit. Vt. Stat. Ann. tit. 32, § 8911(9).

Accordingly, appellant's premise is incorrect: had appellant been a resident of Vermont at the time he purchased his car, he would not have received credit for the sales tax paid Wisconsin. Because the car had been permanently registered in Wisconsin both appellant and the longtime resident would be liable for the same amount of use tax. As the Vermont Supreme Court stated, "Under the present statutory scheme, plaintiff pays the same tax and is treated in exactly the same manner as all non-exempt persons, including the resident who purchases his vehicle in a nonreciprocal state." *Leverson v. Conway*, __Vt.__ (Filed, June 15, 1984), Jurisdictional Statement at 22a.

B. The Vermont Supreme Court Was Clearly Correct In Its Decision That The Motor Vehicle Purchase And Use Tax Does Not Violate The Commerce Clause, And Thus A Substantial Federal Question Is Not Presented.

Sales and use taxes are different in concept and are assessed upon different transactions. *McLeod v. Dilworth*, 322 U.S. 327, 330-31 (1944). Vermont imposed a use tax only after the appellant became a resident, and it was based upon the value of the car at that time; it was not based upon the sales price paid by appellant when he purchased the car in Wisconsin as a resident of that state. The new resident who brings along a car which had been previously registered in a different state is liable for the same amount of tax as the lifelong resident who, at the same time, purchases the identical car in Vermont (or elsewhere) and who wishes to use it on Vermont highways. See *Section A, supra; Leverson v. Conway*, __Vt.__ (Filed, June 15, 1984), Jurisdictional Statement at 22a.

Any "disparity" in the total tax paid results from the fact that appellant was a legal resident of several states and that "a state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 587 (1937). Anent the tax treatment by Vermont, however, "when the account is made up the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity, and the other upon another, but the sum is the same when the reckoning is closed...." *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937). The challenge under the Commerce Clause is nothing more than an attempt by a new resident to avoid his responsibility to this state and to obtain preferential treatment.

Appellant has revealed that there have been only two state court decisions addressing the Commerce Clause issue, one of which was rendered by an intermediate appellate tribunal. See *Montgomery Ward & Co. v. State Board of Equalization*, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1969) cert. denied, 396 U.S. 1040 (1970). Nor do the commentators apparently believe that this issue is currently pressing, for the most recent law review article identified by appellant is nearly twenty years old. Clearly, a substantial federal question is not presented.

C. The Case Is Not Within The Appellate Jurisdiction Of The Court.

Appellant contends that the Court has jurisdiction under 28 U.S.C. § 1257(2). In the proceedings below, however, plaintiff did not explicitly challenge the constitutional propriety of any Vermont statutes. Rather, the action was commenced because plaintiff was aggrieved that the General Assembly had repealed, several years before he became a resident, Vt. Stat. Ann. tit. 32, § 8911(6) which had exempted new residents from liability for the motor vehicle use tax if the vehicle had been purchased, registered and used in another state for at least thirty days. Plaintiff posited that Vermont's failure to include him within one of the statutorily exempted classes, Vt. Stat. Ann. tit. 32, § 8911, impaired his constitutional right to travel. As the Court stated in *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185 (1945),

> "It is essential to our jurisdiction on appeal under § 237(a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the Federal Constitution, treaties or laws. [Citations omitted]. And it has long been settled that an attack upon a tax assessment or levy ... on the ground that it infringes a taxpayer's federal rights, privileges, or immunities will not sustain an appeal under § 237(a). [Citations omitted]."

See also *Jett Bros. Co. v. City of Carrollton*, 252 U.S. 1 (1919).

Accordingly, the Court lacks appellate jurisdiction. For the reasons set forth in sections III A and B, the Court should also deny certiorari.

IV CONCLUSION

For the aforegoing reasons, it is respectfully submitted that this appeal should be dismissed or the decision of the Vermont Supreme Court affirmed.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

Vt. Stat. Ann. tit. 32, § 8902(2):

(2) "Resident"-resident shall include all legal residents of this state and in addition thereto any person who accepts employment or engages in a trade, profession or occupation in this state for a period of at least six months. Also in addition thereto any foreign partnership, firm, association or corporation doing business in this state shall be deemed to be a resident as to all vehicles owned or leased and ordinarily used by it in connection with its place of business in this state. Resident shall not include any person, firm or corporation not required to register motor vehicles by reason of any reciprocity provision with any other state.

Vt. Stat. Ann. tit. 32, § 8903(a):

(a) There is hereby imposed upon the purchase in Vermont of a motor vehicle by a resident a tax at the time of such purchase, payable as hereinafter provided. The amount of the tax shall be four percent of the taxable cost of the motor vehicle or $600.00 for each motor vehicle, whichever is smaller.

Vt. Stat. Ann. tit. 32, § 8903(b):

(b) There is hereby imposed upon the use within this state a tax of four percent of the taxable cost of a motor vehicle, or $600.00 for each motor vehicle, whichever is smaller, by a person at the time of first registering or transferring a registration to such motor vehicle payable as hereinafter provided, except no use tax shall be payable hereunder if the tax imposed by subsection (a) above has been paid.

Vt. Stat. Ann. tit. 32, § 8907:

The commissioner may investigate the taxable cost of any motor vehicle transferred subject to the provisions of this chapter. If the motor vehicle is not acquired by purchase in Vermont or is received for an amount which does not represent actual value, or if no tax form is filed or it appears to the commissioner that a tax form contains fraudulent or incorrect information,

he may in his discretion, fix the value of said motor vehicle at the average book value of the same make, type, model and year of manufacture as designated by the manufacturer as shown in the Official Used Car Guide, National Automobile Dealers Association (New England edition) or any comparable publication, compute and assess the tax due thereon, and notify the purchaser thereof forthwith by certified mail, and said purchaser shall remit the same within fifteen days thereafter.

Vt. Stat. Ann. tit. 32, § 8911:

The tax imposed by this chapter shall not apply to:

(1) motor vehicles owned or registered by any state or province or any political subdivision thereof;

(2) motor vehicles owned and operated by the United States of America;

(3) motor vehicles owned and registered by religious or charitable institutions or volunteer fire companies;

(4) motor vehicles owned and operated by a dealer and registered and operated under the provisions of sections 451-468 inclusive of Title 23;

(5) nonregistered motor vehicles other than tow or repairman vehicles;

(6) [Repealed.]

(7) motor vehicles, title to which on the effective date of this chapter is in the owner seeking registration thereof;

(8) motor vehicles transferred to the spouse, mother, father or child of the donor, or to a trust established for the benefit of any such persons or for the benefit of the donor, or subsequently transferred among such persons provided such motor vehicle has been registered in this state in the name of the original donor;

(9) pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference;

(10) motor vehicles registered in Vermont by the transferor and transferred between that individual or partnership and a business entity controlled by the transferor, if the transfer is exempt under section 351 of the United States Internal Revenue Code in effect July1, 1966;

(11) motor vehicles owned or purchased in another state by a member of the armed forces of full time active duty or his spouse upon which a purchase, use or sales tax has been paid in another state, except that, if that tax is less than the tax payable in this state but for this subdivision, the tax applies in the amount of the difference;

(12) motor vehicles owned and operated by physically handicapped persons for whom the vehicle's controls have been altered to enable such persons to drive. This exception shall apply only when such handicapped person has been certified exempt from the tax by the commissioner of motor vehicles under the provisions of section 8901 of this title;

(13) motor vehicles obtained from the government as excess government property, or vehicles purchased with 100 percent federal funds and used for federally suported (sic) local programs.

Vt. Stat. Ann. tit. 32, § 8911(6) (repealed, 1979 No. 202 (Adj. Sess.), § 3 Pt. VI, eff. September 1, 1980):

The tax imposed by this chapter shall not apply to:

Pleasure cars, the owners of which were not residents of this state at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont.

Vt. Stat. Ann. tit. 23, § 301:

Residents as defined in section 4 of this title, except as provided in section 301a of this title, shall annually register motor vehicles owned or leased for a period of more than thirty days and operated by them, unless currently registered in Vermont. A person shall not operate a motor vehicle nor draw a trailer or semi-trailer on any highway unless such vehicle is registered as provided in this chapter.

Wis. Stat. Ann. § 341.40(2):

If the owner of [a vehicle which is registered in another jurisdiction moves to Wisconsin] or if the vehicle is purchased by a Wisconsin resident, the vehicle immediately becomes subject to the laws of this state providing for the registration of vehicles.